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Mailed:
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Grendel

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Totally Low Carb Stores, Inc.¹

Serial No. 78292708

Anthony J. Bourget of bourgetlaw.com for Totally Low Carb Stores, Inc.

Laura Gorman Kovalsky, Trademark Examining Attorney, Law Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Grendel, Holtzman and Kuhlke, Administrative Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register of the mark TLC FOODS (in standard character form; FOODS disclaimed) for services recited in the application as "retail store services featuring grocery products and

¹ By assignment from H & H of Eau Claire, LLC, recorded on April 6, 2004 at Reel 2824, Frame 0720, Totally Low Carb Stores, Inc. is now the applicant herein.

convenience store items; franchise services, namely offering technical assistance in the establishment and/or operations of retail stores," in Class 35.

The Trademark Examining Attorney has issued a final refusal of registration on the ground that applicant's mark, as applied to the services recited in the application as "retail store services featuring grocery products and convenience store items," so resembles the mark depicted below,



previously registered on the Principal Register (with disclaimers of CARD and CUSTOMERS) for services recited in the registration as "retail grocery store services,"² as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d).³

² Registration No. 2317906, issued February 15, 2000.

³ The Trademark Examining Attorney's Section 2(d) refusal pertains only to the services identified in the application as "retail store services featuring grocery products and convenience store items." She has expressly stated, in her final Office action and in her brief, that the refusal does not apply to the services recited as "franchise services, namely offering technical assistance in the establishment and/or operations of retail stores." Contrary to the assertions made by both

Applicant has appealed the final refusal. Applicant and the Trademark Examining Attorney filed main appeal briefs, and applicant filed a reply brief. No oral hearing was requested. After careful consideration of the arguments presented by applicant and the Trademark Examining Attorney, we reverse the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

applicant and the Trademark Examining Attorney in their briefs, however, Trademark Rule 2.65(a), the "partial abandonment" rule, does not apply in this case because applicant has not failed to respond to any Office action containing the Section 2(d) refusal, up to and including the briefing stage of the case. The point is moot, however, in view of the fact that we are reversing the Section 2(d) refusal, and thus allowing the application to proceed as to all of the services recited in the application.

The pertinent services identified in applicant's application, i.e., "retail store services featuring grocery products and convenience store items," and the services recited in the cited registration, "retail grocery store services," are essentially identical.⁴ The trade channels and classes of purchasers for such services likewise are identical. The purchasers of the services would be ordinary consumers, who would purchase the services without a great deal of care or sophistication. These facts all weigh in favor of a finding of likelihood of confusion.

We turn next to the first *du Pont* factor, i.e., whether applicant's mark and the cited registered mark are similar or dissimilar when compared in their entirety in terms of appearance, sound, connotation and commercial impression. We make this determination in accordance with the following principles.

The test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial

⁴ As noted *supra* at footnote 3, the Trademark Examining Attorney's Section 2(d) refusal does not apply to the services recited in the application as "franchise services, namely offering technical assistance in the establishment and/or operations of retail stores." We therefore need not decide whether those services are similar or dissimilar to the services recited in the cited registration.

impression that confusion as to the source of the services offered under the respective marks is likely to result.

The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks and service marks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Finally, in cases such as this, where the applicant's services are identical to the opposer's services, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be if the services were not identical. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Initially, we find that although the dominant feature of applicant's mark, for purposes of our likelihood of confusion analysis, is the acronym TLC (given the descriptiveness and/or genericness of FOODS), we cannot agree with the Trademark Examining Attorney's contention

that the dominant feature of the cited registered mark is the "T.L.C." element thereof. First, "T.L.C." appears in the mark as part of the phrase "T.L.C. Card." Second, viewing the mark as a whole, "T.L.C." would be perceived as an abbreviation of the other wording in the mark, i.e., "Thanks Loyal Customers." For both of these reasons, we find that "T.L.C." is so interwoven with the other elements of the mark that we cannot single it out as the dominant feature of the mark.

We also find that the only point of similarity between the marks is the presence in applicant's mark of the letters TLC and the presence in the cited registered mark of the letters "T.L.C." The marks otherwise bear no similarity to each other.

In terms of appearance, the TLC in applicant's mark and the T.L.C. in registrant's mark are similar but not identical, due to the presence of the periods between the letters in the cited registered mark. We note that the dictionary and acronym dictionary evidence of record depicts TLC (as an acronym for "tender loving care") without any periods between the letters. The other features of the respective marks, i.e., the heart design and the wording "Thanks Loyal Customers" in the cited registered mark and the word "FOODS" in applicant's mark,

are visually dissimilar. Viewed in their entireties, we find that the marks are dissimilar in terms of appearance.

In terms of sound, the marks are identical as to the TLC in applicant's mark and the T.L.C. in the cited registered mark, but the other features of the respective marks do not sound the same. Considering the marks in their entireties, we find that they are aurally dissimilar.

In terms of connotation, we find that the marks are dissimilar when viewed in their entireties. Again, the only point of similarity between the marks is the TLC in applicant's mark and the T.L.C. in the cited registered mark. However, we find that the TLC in applicant's mark (without the periods) connotes the phrase "tender loving care," and the mark as a whole connotes foods that are sold, or customers that are served, with "tender loving care."⁵ In the cited registered mark, "T.L.C." clearly connotes "Thanks Loyal Customers" due to the presence in

⁵ We note that applicant's corporate name is Totally Low Carb Stores, Inc., and that applicant likely intends the letters TLC to stand for Totally Low Carb. However, neither applicant's corporate name, nor its likely intention as to the meaning of TLC, is apparent from the mark itself. Purchasers encountering the mark thus are likely to assume that TLC has its usual acronym significance, i.e., "tender loving care." Moreover, even if purchasers were to perceive the TLC in applicant's mark as connoting "Totally Low Carb," that connotation, like the connotation "tender loving care," is dissimilar to the "Thanks Loyal Customers" connotation of "T.L.C." in the cited registered mark.

the mark of that phrase; customers viewing the mark as a whole will readily understand "T.L.C." to be an abbreviation of "Thanks Loyal Customers." Considering the marks in their entirety, we find that they have dissimilar connotations.

In terms of overall commercial impression, we find that applicant's mark TLC FOODS gives the impression of being the name of the store whose foods are sold, or whose customers are served, with tender loving care.⁶ The cited registered mark, on the other hand, gives the impression of a discount/reward card program which is offered in connection with registrant's grocery store services. This is a reasonable inference, given the presence of the word CARD in the cited registered mark, as well as the words "Thanks Loyal Customers." We note as well that the Trademark Examining Attorney concedes in her brief that the word CARD in the mark suggests that the mark is used for a discount program offered in conjunction with registrant's grocery store services. Moreover, the commercial impression of the cited registered mark is not that of a store name, further distinguishing it from the commercial impression created by applicant's mark. Thus, TLC in

⁶ See *supra* at footnote 5.

applicant's mark and T.L.C. in the cited registered mark (and, again, this is the only point of similarity between the two marks) present different commercial impressions when viewed in the context of the marks in their entirety.

For the reasons discussed above, we find that the marks are dissimilar when viewed in their entirety as to appearance, sound, connotation and overall commercial impression. Moreover, we find that the two marks are sufficiently dissimilar that confusion is unlikely, notwithstanding the identical nature of the services at issue. Considering and weighing all of the relevant *du Pont* factors pertinent to this case, we find that the dissimilarity of the marks under the first *du Pont* factor simply outweighs the other relevant *du Pont* factors, and we conclude that there is no likelihood of confusion.

Decision: The refusal to register is reversed.